

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Bay State Gas Company

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) **D.T.E. 06-7**
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**THE ATTORNEY GENERAL’S MOTION TO STRIKE SECTIONS OF BAY STATE’S
REPLY BRIEF**

I. INTRODUCTION

Pursuant to 220 C.M.R. §§ 1.10 (1) and 1.11(8) the Attorney General moves to strike extra-record evidence and unsworn statements in the Reply Brief of the Bay State Gas Company (“Bay State” or “Company”). In its Reply Brief Bay State discusses the guidance it sought from the Department of Telecommunications and Energy (“Department”) regarding the filing due date for its long-range forecast. This discussion is without record support of any type, and, in fact, contradicts record evidence. The Attorney General now moves to strike the reference to the guidance it sought from the Department regarding its due date for the Company’s long-range forecast.

II. STANDARD OF REVIEW

Unsworn statements shall not be considered as evidence. 220 C.M.R. § 1.10 (1). The Department’s rules also provide that “[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause.” 220 C.M.R. § 1.11(8). To cite, reference or otherwise rely upon extra-record evidence and statements violates the Attorney General’s due process rights and the Department’s rules and precedent. *MediaOne/New England Telephone*, D.T.E. 99-42/43, at 17-

18 (1999); *Boston Edison Company*, D.P.U. 90-335, at 7-8 (1992); *Payphone Inc.*, D.P.U. 90-171, at 4-5 (1991); *see also* M.G.L. c. 30A, § 11; 220 C.M.R. §§ 1.11(4), 1.11(7) and 1.11(8). When faced with a reference to extra-record evidence, Department precedent establishes that the proper procedure is to “strike extra-record evidence from a brief and require the offending party to file a conforming brief without reference to the excluded evidence.” *Boston Edison Company v. Brookline Realty & Inv. Corp.*, 10 Mass.App.Ct. 63, 69 (1980). The Department has also used an alternative approach to “[strike] the offending portions from the brief and [] disregard those portions of the brief in reaching a decision in the case.” *AT&T Communications*, D.P.U. 91-79, at 8 (1992), *citing* *Service Publications Inc. v. Goverman*, 396 Mass. 567, 580 (1986); *Hull Municipal Light Plant*, D.P.U. 87-19-A, at 7 (1990); *Boston Edison Company*, D.P.U. 90-335, at 7-9 (1992).

Only in limited circumstances has the Department found good cause to permit the submission of evidentiary documents into the record following the close of evidentiary hearings. *Payphone Inc.*, D.P.U. 90-171, at 4-5 (1991) (fundamentally unfair to admit evidence not subject to cross examination). The Department’s case law on late-filed exhibits is based upon the premise that the material is prejudicial because other parties do not have the opportunity to conduct cross-examination regarding the new evidence in order to test the accuracy of the data through the litigation process. *New England Telephone and Telegraph Company*, d/b/a/ NYNEX, D.P.U. 94-50, at 62 (1995).

III. ARGUMENT

1. Bay State's Discussion Of Its Filing Date For Its Long-Range Forecast In Its Reply Brief Has No Record Support, But Contradicts The Record, And, Therefore, Should Be Stricken From Its Reply Brief.

Although the record in this case contains no evidence that Bay State sought and received guidance from the Department on the due date for filing of its long-range forecast, Bay State references this guidance in its Reply Brief. *Company Reply Brief* ("Co. R. Br."), at 2. There is no record citation for the Company's statement in its Reply Brief that the Department's "[o]rders [in docket 02-75] were silent on the date of the next filing, [therefore] Bay State sought guidance on this point [the filing due date] and the Department indicated that Bay State's next IRP [long-range forecast] filing would be due in October 2006," Co. R. Br., at 2, because no record evidence exists supporting this claim. In fact, the Company witness provided testimony that directly contradicts this statement because he testified that the Department set a due date of October 2006 its orders in *Bay State Gas Company*, D.T.E. 02-75 (2002). Hearing Transcript, at 35, lines 9-14; *see also* Attorney General's Initial Brief, at 6 (noting that the witness testified the Department set a due date of October 2006 within the orders issued in docket D.T.E. 02-75). The statement made by Bay State amounts to an unsworn statement or reference to extra-record evidence and should be stricken. 220 C.M.R. §§ 1.10 (1) and 1.11(8).

The Company should not be allowed to admit testimony on brief regardless of the witness's incorrect testimony caused by witness's own unpreparedness to answer questions that fell well within the scope of the proceeding and the Company's own failure to correct the testimony. Had the evidentiary hearing addressed the alleged Department's guidance outside the orders, the Attorney General certainly would have explored in great detail the nature and validity

of the alleged guidance, *i.e.* whether the Company, received guidance from a hearing officer in an off-record conversation or did the Company receive guidance directly from the Commission on the record, and whether the Company reasonably relied on the alleged guidance in the face of express statutory language to the contrary.

WHEREFORE for these reasons the Attorney General requests:

1. That the Department strike and disregard the portions of the Company's Reply Brief that refers to guidance allegedly given to the Company by the Department on the due date the Company's next long-range forecast.
2. That the Department grant such other relief it finds just and proper.

Respectfully submitted,

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